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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Preliminary Statement	1
1. The Wholesale Interstate Sales of Milk Excluded by the Commissioner are Not "Essentially Local" in Nature	2
2. The Commissioner's Prohibition of Interstate Commerce Here on Economic Grounds Cannot be Justified by the Facial "Evenhandedness" of the Statute and the Lack of "Avowed Discriminatory Purpose"	5
3. The Commerce Clause Does Not Permit a "Balancing Test" to Evaluate the Exclusionary Action Involved Here	6
4. The Commissioner is Unable to Distinguish the Controlling <i>Baldwin</i> and <i>Hood</i> decisions	9
Conclusion	11

TABLE OF AUTHORITIES

Cases:	PAGE
<i>A&P Tea Co. v. Cottrell</i> , 424 U.S. 366 (1976)	3, 4, 5
<i>Baldwin v. G.A.F. Seelig</i> , 294 U.S. 511 (1935)	3, 4, 8, 9, 10
<i>Buck v. Kuykendall</i> , 267 U.S. 307 (1925)	4
<i>Dean Milk Co. v. City of Madison</i> , 340 U.S. 349 (1951) ..	5, 6
<i>H.P. Hood & Sons, Inc. v. DuMond</i> , 336 U.S. 525 (1949)	4, 8, 9, 10, 11
<i>Milk Control Board v. Eisenberg Farm Products</i> , 306 U.S. 346 (1939)	2
<i>Panhandle E.P. Co. v. Michigan Public Service Comm.</i> , 341 U.S. 329 (1951)	11
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	5, 7, 8
<i>Schwegmann Bros. Giant S. Mkts. v. Louisiana Milk Comm.</i> , 363 F.Supp. 1144 (M.D. Louisiana 1973), <i>aff'd</i> 416 U.S. 922 (1974)	3
<i>State v. Pure Vac Dairy Products Corp.</i> , 251 Miss. 457, 170 So.2d 274 (1964), <i>appeal dismissed sub nom. Pure Vac Dairy Products Corp., ex rel. Pat- terson</i> , 382 U.S. 14 (1965)	2
<i>Toomer v. Witsell</i> , 334 U.S. 385 (1948)	5
<i>Tuscan Dairy Farms, Inc. v. Barber</i> , 45 N.Y.2d 215 (1978)	3
<i>United Dairy Farmers Coop. Ass'n v. Milk Control Comm.</i> , 335 F.Supp. 1008 (M.D. Penn. 1971), <i>aff'd</i> 404 U.S. 930 (1971)	2
Statutes and Rules:	
<i>Federal</i>	
Rules of Supreme Court, of the United States	
Rule 16(4)	1
<i>State</i>	
New York Agriculture and Markets Law § 258-c (McKinney's Supp. 1977)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,
Petitioner-Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and
Markets of the State of New York,
Respondent-Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

APPELLANT'S BRIEF OPPOSING
MOTION TO DISMISS

Preliminary Statement

Appellant Tuscan Dairy Farms, Inc. submits this brief pursuant to Rule 16(4) of the Rules of the Supreme Court of the United States in opposition to the motion of appellee, the New York Commissioner of Agriculture and Markets ("Commissioner"), to dismiss this appeal.

Failing to address the substantial federal constitutional questions resulting from New York's absolute exclusion of New Jersey milk, the Commissioner's motion to dismiss in-

stead relies on four legal contentions which we show below are utterly without merit.¹

1. The Wholesale Interstate Sales of Milk Excluded by the Commissioner are Not "Essentially Local" in Nature.

The Commissioner's principal contention appears to be that the activity prohibited in this case—the sale of milk at wholesale by a New Jersey milk processor to a New York retailer—is “essentially of a ‘local’ nature” (Mot., pp. 5-8) and thus does not fall within the ambit of the Commerce Clause. He relies primarily on *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939) (licensing, bonding, and price control); *State v. Pure Vac Dairy Products Corp.*, 251 Miss. 457, 170 So.2d 274 (1964), *appeal dismissed sub nom. Pure Vac Dairy Products Corp. v. Mississippi, ex rel. Patterson*, 382 U.S. 14 (1965) (price control); and *United Dairy Farmers Coop. Ass'n v. Milk Control Comm.*, 335 F.Supp. 1008 (M.D. Penn. 1971), *aff'd* 404 U.S. 930 (1971) (price control).

It is difficult to understand why the Commissioner urges this argument here, because it is one that the New York

1. Several “factual” statements made by the Commissioner are also incorrect. For example, the Commissioner suggests that the “range of services and product available to small accounts” has been impaired by “destructive competition” (Mot., p. 9). Not only does this statement (made without record reference) have no support in the record but, to the contrary, the record shows a wide interest in and an active competition for these very institutional and other accounts (e.g. A80, A86, A92, A99-A101, A115, A146, A217, 31a). Similarly, the Commissioner suggests that appellant's entry might have an impact on the existing “balanced milk distribution structure” (Mot., p. 4). However, there is not the slightest indication in the record of what that impact might be, or that any milk dealer had been driven out of business or was in danger of being driven out of business or that any class of customers had been deprived of services in any way.

Court of Appeals expressly rejected below. Indeed, the Court of Appeals distinguished the very cases relied upon by respondent as follows:

“The cases which have upheld State regulation of commerce in milk and dairy products against challenges under the commerce clause have presented predominantly issues of local price regulation [as opposed to outright prohibition], and are thus entirely distinguishable from the present case.” (45 N.Y.2d at 222-223; 7a-8a).

In contrast, the present case involves neither local intrastate transactions nor mere price regulation. The proposed sales here—wholesale transactions from a New Jersey processor to a New York supermarket—would have their origin in one state and terminus in another. Moreover, the Commissioner's action does not merely “regulate” these interstate transactions, but prohibits them outright.

The Commissioner's reliance on *Schwegmann Bros. Giant Supermarkets v. Louisiana Milk Comm.*, 365 F.Supp. 1144 (M.D. La. 1973), *aff'd* 416 U.S. 922 (1974) and *A&P Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (Mot., pp. 6-8) is equally misplaced. In *Schwegmann*, the Court held that the Commerce Clause prevented the Louisiana Milk Commission from requiring Schwegmann, a Louisiana retailer, to pay Pure Vac, a Tennessee manufacturer of frozen desserts, the minimum prices fixed by the Commission. If the Commissioner in this case (as in *Schwegmann* and in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935)) had merely fixed the prices of sales from appellant to its customers in Richmond County, New York, that would have violated the Commerce Clause under *Schwegmann* and *Baldwin*. But here, the Commissioner went further and prohibited the sales outright, an even clearer violation of the Commerce Clause

under *Baldwin v. G.A.F. Seelig*, *supra*; *Buck v. Kuykendall*, 267 U. S. 307, 315-316 (1925); and *H. P. Hood & Sons, Inc. v. DuMond*, 336 U. S. 525 (1949).

Nor did *A&P Tea Co., Inc. v. Cottrell*, *supra*, “reaffirm . . . a state’s broad power to legislate protection where local interests are concerned” (Mot., p. 7). On the contrary, the *Cottrell* case reaffirmed the constitutional prohibition against curtailment of sales of goods in interstate commerce. There, the Court found that a Mississippi regulation which precluded the sale of milk processed in Louisiana plants on a non-health related ground²—namely, that Louisiana had not signed a reciprocity agreement with Mississippi—was violative of the Commerce Clause.

Respondent apparently misconstrues the case to require an “absolute foreclosure” of all commerce in a particular product between two sister states. While that may have been the result in *Cottrell*, it is clear that *any* curtailment of interstate commerce may be prohibited if the objective or result is impermissible. As the Court noted (p. 375):

“Only state interests of substantial importance can save [a regulation] in the face of that devastating effect upon the free flow of interstate milk.”

And the court made it quite clear that obstruction of interstate commerce cannot be justified “as an economic measure”, stating (p. 381):

“The mandatory reciprocity provision of § 11, *insofar as justified by the State as an economic measure*, is ‘precisely the kind of hindrance to the introduction of milk from other States . . . condemned as an “unreasonable clog upon the mobility of commerce . . . [It is] hostile in conception as well as burden-

2. The Court rejected Mississippi’s contention that the clause served the state’s interests in maintaining health standards (*See* 424 U.S. at 375).

some in result.”’ *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S., at 377.” (Emphasis added.)

In short, the effect of the statute in *Cottrell* is no different from the one at bar: both obstruct the flow of interstate commerce in the interest of economic protectionism and hence violate the Commerce Clause.

2. The Commissioner’s Prohibition of Interstate Commerce Here On Economic Grounds Cannot be Justified by the Facial “Evenhandedness” of the Statute and the Lack of “Avowed Discriminatory Purpose.”

The Commissioner next contends that his exclusionary action can be justified because of the facial “evenhandedness of the statute” (Mot., p. 8) and because “there was no . . . discriminatory intent or effect in the present case” (Mot., p. 13). In effect, the Commissioner asks this Court to impose a rule which places the enormous burden on interstate businessmen of proving “discriminatory” intent in order to overcome state exclusionary action with candidly economic ends. As demonstrated in our Jurisdictional Statement (pp. 16-19), this Court has *never* recognized the absence of “avowed” discrimination as a justification for exclusionary action for economic ends. While this Court has referred to “discrimination” in a Commerce Clause context, it has made clear that no discriminatory intent is required and that the exclusion of interstate commerce to protect or preserve local economic interests is *per se* “discriminatory.” *See, Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 at n. 4 (1951); *Toomer v. Witsell*, 334 U.S. 385, 403-406 (1948); *Pike v. Bruce Church, Inc.* 397 U.S. 137, 145 (1970).

The Commissioner’s attempt to distinguish the *Dean* case as one involving state regulation which “plainly discrim-

inate[d] against interstate commerce" carefully omits the reasoning on which this Court relied in striking down the ordinance in *Dean* (Mot., p. 12). That ordinance forbade the sale of milk in Madison, Wisconsin as pasteurized unless bottled at a pasteurization plant within five miles of the center of the city. While the ordinance may have been "evenhanded" on its face in that it applied "equally" to in-state and out-of-state producers, this Court clearly recognized its "discriminatory" economic impact, stating (340 U.S. at 354):

"In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce."

Here as in *Dean*, the offending statute, while superficially "evenhanded," creates in its application and effect "an economic barrier protecting a major local industry against competition from without the State [which] plainly discriminates against interstate commerce" and should be struck down. Moreover in *Dean*, where the State invoked its "unquestioned powers to protect the health and safety of its people" (340 U.S. at 354), a balancing test was appropriate. Here, as we now show, where the purpose is only economic (to prevent a "destructive competition"), a balancing test is clearly inappropriate.

3. The Commerce Clause Does Not Permit A "Balancing Test" To Evaluate The Exclusionary Action Involved Here.

Next appellee urges that "a balancing test" should be applied to weigh the "effect" of the Commissioner's action "on the flow of commerce" (Mot., pp. 9-10). But we are aware of no case (and appellee has cited none) employing

a "balancing test" where a prohibition of interstate commerce for economic purposes was involved.

The Commissioner draws on *Pike v. Bruce Church, Inc.*, *supra*, for the "rule" as to the balancing process (Mot., p. 7). There, the Court said (397 U.S. at 142):

"Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . ." (Emphasis added).

Neither of these two prerequisites to the use of a balancing test is present here. *First*, the Commissioner's action totally prohibiting (and not merely regulating) appellant's interstate sales in Richmond County has an exclusionary effect on interstate commerce. No case or rational definition has characterized a total exclusion of interstate commerce in a product as "only incidental." *Second*, the sole ground for the Commissioner's exclusion of appellant from the Richmond County market was that appellant's entry "would tend to a destructive competition for milk sales in a market already adequately served and as such would not be in the public interest" (38a). Nowhere, does the Commissioner demonstrate how this unabashedly protectionist rationale for his action "effectuate[s] a legitimate local public interest." Thus the second prerequisite for application of a balancing test under *Pike* is also entirely lacking.

What is, in the language of *Pike*, a "legitimate local public interest" is clarified in later portions of the opinion not quoted by respondent. The regulations at issue in *Pike* were Arizona's requirement that cantaloupes grown in Arizona be labelled and packaged in a certain manner in order to "promote and preserve the reputation of Arizona's

growers by prohibiting deceptive packaging”³ (397 U.S. at 143). Such a regulation, of course, is not in the nature of a prohibition (such as was imposed here) and falls within the ambit of traditional “police power” objectives drawn in this Court’s decisions in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935) and *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949), which, in addition to health, safety and educational purposes, includes the prevention of fraud. The Court, however, found that this interest occupied a relatively low position in the hierarchy of state interests and could not justify the burdening of interstate commerce. The Court stated (397 U.S. at 143):

“We are not, then, dealing here with ‘state legislation in the field of safety where the propriety of local regulation has long been recognized,’ or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State.”

The purpose of the statute here is the control of local competition—a purpose which has “always [been] held to be precluded by the Commerce Clause” (*Hood, supra*, 336 U.S. at 542). That State regulation of competition cannot be accepted as a ground for burdening interstate commerce lies at the core of the Commerce Clause and the concept of federalism. This point should have been laid to rest in *Hood* where this Court stated in the memorable words of Justice Jackson (336 U.S. at 537-538):

“This principle that our economic unit is the Nation, which alone has the gamut of powers neces-

3. The interstate packer-distributor in the case, Bruce Church, Inc., would have been forced to build an expensive packing plant in Arizona as a practical effect of the regulation, rather than utilize existing California facilities.

sary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig*, 294 U.S. 511, 527, ‘what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.’ In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition.”

Nor is there any basis for the Commissioner’s contention that *Cottrell* supports the application of a “balancing test” in this case (Mot., p. 13). In *Cottrell*, the Court noted that a balancing test comes into play when the “challenged exercise of local power serves to further a legitimate local interest” (424 U.S. at 371). There the state contended that the regulation involved, promoted legitimate health interests of the citizens of the State of Mississippi, and the argument was rejected (424 U.S. at 375). Here, there is no health, safety, education or anti-fraud basis for the statute. The only purported justification professed is the prevention of “destructive competition”, a patently economic end which can never justify the curtailment of interstate commerce (See also Jurisdictional Statement, pp. 12-14).

4. The Commissioner Is Unable to Distinguish the Controlling *Baldwin* and *Hood* Decisions.

This Court has consistently held that a state has no power to prohibit the sale of goods in interstate commerce solely for the protection of local economic interests. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949). We have demonstrated that the attempt of the Court of Appeals to suggest that the Commissioner’s admitted economic protectionism (in

prohibiting sales by appellant on the ground that they "would tend to a destructive competition for milk sales in a market already adequately served") is some type of "consumerism", does not change the fact that the identical argument was resoundingly rejected by this Court in *Baldwin* and *Hood* (See Jurisdictional Statement, pp. 10-16).

Seeking to distinguish *Baldwin*, the Commissioner urges that the enactment therein attempted "to affect or regulate" the "market structure of a foreign market" (Mot., p. 11). But, the Commissioner's action here had a far more egregious effect on transactions in New Jersey, than the regulation in *Baldwin* had on transactions in Vermont. Here the transactions were prohibited outright whereas in *Baldwin*, New York merely sought to regulate the price of milk purchased in Vermont for sale in New York (See also Jurisdictional Statement, pp. 14-16).

Finally, the Commissioner attempts to distinguish *Hood* by urging that there "a statute neutral on its face was applied in a patently discriminatory manner designed to favor a local milk industry" (Mot., p. 12). The purported distinction is non-existent. In *Hood*, the Commissioner denied the application of a Massachusetts corporation pursuant to Section 258-e of the New York Agriculture and Markets Law (the very statute at issue herein) for a license to construct a milk receiving depot in New York for shipment of raw milk to Boston on the ground that such an operation might have had "a tendency to deprive [local] markets of a supply needed during the short season" 336 U.S. at 529. This Court found the Commissioner's determination violated the Commerce Clause, holding (336 U.S. at 531-532):

"Our decision in a milk litigation most relevant to the present controversy deals with the converse of the present situation. *Baldwin v. Seelig*, 294 U.S. 511.

• • •

"In neither case is the measure supported by health or safety considerations but solely by protection of local economic interests, such as supply for local consumption and limitation of competitors. This Court unanimously rejected the State's contention in the Seelig case and held that the Commerce Clause, even in the absence of Congressional action, prohibits such regulation for such ends." (Emphasis added).

Thus, the only "discrimination" found by the Court in *Hood* was that which necessarily results from any attempt to protect local competition. As stated in *Panhandle E.P. Co. v. Michigan Public Service Comm.*, 341 U.S. 329, 337 (1951), *Hood* held that New York had "discriminated against interstate commerce by prohibiting it because it would subject local business to competition." Here the Commissioner advances a rationale for his exclusionary action identical to the one rejected in *Hood*—namely that appellant's entry "would tend to a destructive competition for milk sales in a market already adequately served." (38a).

Unlike any case ever decided by this Court, if the judgment of the Court of Appeals herein is permitted to stand, this Court will have permitted a State to obstruct the flow of interstate commerce for the purpose of promoting local economic ends.

Conclusion

For the foregoing reasons and the reasons set forth in the Jurisdictional Statement, probable jurisdiction should be noted and the judgment reversed.

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November 27, 1978

Respectfully submitted,

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